APPENDIX.

Vernon's Texas Statutes, 1936, Art. 6085:

"*Where defendant is unknown.*—If the plaintiff, his agent or attorney, at the commencement of any suit, or during the progress thereof, for the partition of land, shall make affidavit that an undivided portion of the land described in the plaintiff's petition in said suit is owned by some person unknown to affiant, the clerk of the court shall issue a citation to the proper officer, which shall contain a brief statement of the nature of the suit, and a description of the interest of the unknown owner or owners, commanding such officer to summon such unknown owner or owners by making publication of the citation in some newspaper in the county where the writ issued, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, for four successive weeks previous to the return day of such process. When such notice is given, and no appearance is entered within the time prescribed for pleading, the court shall appoint an attorney to defend in behalf of such owner or owners, and proceed as in other causes where service is made by publication. It shall be the special duty of the court in all such cases to see that its decree protects the rights of the unknown parties thereto. The judge of the court shall fix the fee of the attorney so appointed, which shall be entered and collected as costs against said unknown owner or owners. (Acts 1879, p. 46; G. L., vol. 8, p. 1346.)"

Vernon's Texas Statutes, 1936, Art. 6100:

"*Decree shall vest title.*—The decree of the court confirming the report of the commissioners in partition, when a partition has been made shall vest the title in each party to whom a share has been allotted, to such share as against the other parties to such partition suit, their heirs, executors, administrators or assigns, as fully and effectually as the deed of such parties could vest the same, and shall have the same force and effect as a full warranty deed of conveyance from such other parties and each of them. (Id.)"

Avis et al. v. First National Bank of Wichita Falls.

No. 8025

(Supreme Court of Texas)

Tried in Wichita County and brought to the Supreme Court by writ of error from the Second District Sept. 30, 1942.

This suit was brought for the purpose of construing a will and to determine the powers of the testamentary trustee, the Bank respondent, with respect to executing mineral and other leases on lands belonging to the estate. The trial court's judgment accorded such authority to the trustee under the will, and this judgment was affirmed by the Court of Civil Appeals. In this opinion by Justice Sharp, delivered by the Supreme Court February 24, 1943, both of these judgments are reversed and rendered in accordance with the construction given the will.

For Petitioners: Weeks, Hankerson & Surles and Russell Surles, Tyler.

For Respondent: Kilgore & Rogers, Wichita Falls.

Wills—Trustees—Oil and Gas Leases.

A testamentary Bank trustee under a will given "full, ample, complete and absolute power to manage, control, sell and dispose of * * rent, make leases thereon and in every way handle same" is held not to have had the power to execute oil and gas leases on lands owned by the estate, in the absence of an express provision therefor, and courts are not justified in writing into his will language the testator did not see fit to use therein.

JUSTICE SHARP: This suit was brought by the First National Bank of Wichita Falls, as testamentary trustee, to have construed the last will of J. D. Avis, deceased. The beneficiaries under the trust created by the will and the ultimate beneficiaries after the trust ended, in so far as they were at the time of the suit in being, together with the wives and husbands of such beneficiaries, were made party defendants. The only question involved is whether or not the language of the will creating the trust empowered the testamentary trustee to execute and deliver mineral leases, specifically oil and gas leases, on the land belonging to the trust estate. Some of the defendants contested the power of the trustee to make such leases. The trial court, acting without a jury, construed the will as giving the trustee bank "plenipotentiary" powers, including the authorization "to execute, acknowledge and deliver mineral leases and mineral leasehold estates upon lands belonging to said trust estate." The defendants appealed, and the Court of Civil Appeals affirmed the judgment of the trial court. 162 S. W. (2d) 1072.

J. D. Avis executed his will on November 16, 1931, and died on September 29, 1935. The will was admitted to probate in Wichita County on the 2d day of November,

1935. The pertinent parts of such will relating to the question before us are as follows:

Paragraph No. 2 of the will appoints the First National Bank of Wichita Falls, Texas, "my independent executor and trustee, under this my last will and testament, and as such executor, I give to said First National Bank of Wichita Falls, Texas, the full and ample powers conferred upon it as Trustee," and provides that no security or bond be required in either capacity, and provides for independent administration. In case of the Bank's refusal or failure to act, it provides for the appointment of a substitute trustee, who shall give bond, and thereupon succeed to all of the rights of the original trustee. We quote from the will the following:

"3.

"I hereby give, devise and bequeath all of my property, real personal and mixed of every kind and character, of which I may die seized and possessed, after the payment of my just and lawful debts, unto said First National Bank of Wichita Falls, Texas, as trustee, and unto its successor in this trust, for the uses, purposes and trusts hereinafter specified; and I hereby direct that all of said property together with any changes or accretions thereto, shall be held, used, managed, disposed of, sold, disbursed by said trustee, according to the further terms of this will; and I do hereby grant to said trustee full, ample, complete and absolute power to manage, control, sell, and dispose of said trust property, rent, make leases thereon, and in every way handle same, subject only to the express limitations hereinafter contained."

"4.

"I hereby declare that all of the property that I now own or possess is the community property of my self and

my wife, Minnie Ola Avis, with the exception of the following, viz.: seventy shares of stock in the First National Bank of Wichita Falls, Wichita County, Texas; and twenty-five shares of stock in the First National Company of Wichita Falls, Texas, is separate property, having been purchased with money received directly from my mother's estate; the property situated at the corner of ninth and Burnett in the City of Wichita Falls, being 150 feet by 200 is also separate property, I having received it directly from my mother's estate."

"5.

"I hereby direct that immediately upon my death, that my trustee herein appointed, shall take full and complete charge of my estate, attend to the probating of this will, and pay my debts and funeral expenses. After that is done, I direct that my trustee shall keep the corpus of my estate intact, if possible, and so far as practical, until the death of my wife, subject to the provision hereinafter contained with reference to her remarriage; and shall pay over to said Minnie Ola Avis, the entire net income from my estate during her lifetime, and as often and at such times as the receipt of income from said estate will justify and shall be deemed expedient by my trustee, but preferably monthly, or quarterly, it being my desire that my said wife shall have ample funds at all times."

"6.

"In the event that my wife should remarry, after my decease, then I direct that my said trustee shall make an immediate settlement of my entire estate, by setting over or paying to my wife, one-fourth of same, the other three-fourths to be immediately distributed equally between our seven children, F. P. Avis, J. D. (Dave) Avis, Jr., A. W. (Jake) Avis, Mrs. W. F. Weeks, Mrs. H. S. Baum, Mrs.

W. U. McCutchen and Mrs. Ralph Dunkelberg, the said trustee being fully empowered to make such disposition of my estate as will enable it to make fair division, giving one-fourth to my wife, and the other three-fourths equally to the children."

"7.

"But if my wife shall survive me, and shall not remarry, then at her death, I direct that said estate shall be immediately divided by said trustee, among my children, above named, in equal proportions.

"And in connection with any division of my estate among my children, I direct that if any of my children above named shall at that time have died, then said trustee shall pay over to that child's natural heirs, that child's portion of my estate; and if that child having died, left no natural heirs, then said portion to be divided equally among the living children, or their natural heirs."

"10.

"There shall be no liability on said trustee for loss resulting from the administration of this trust, except such as occurs through wilful neglect of said trustee, but I admonish such trustee to handle said property as discreetly as it has heretofore managed its own business for many years past."

The inventory of the estate, filed in connection with the probate of the will, showed debts in the amount of something over $24,000.00. The pleadings and the testimony at the time of the trial showed that all of the indebtedness had been or was at that time being paid. For that reason, whatever power the Bank now has is by virtue of its power as trustee, rather than as executor. The evidence

adduced at the trial shows that J. D. Avis was a stockholder and customer of the bank and a personal friend of its officials. It also shows that there was at the time of the making of the will, and there had been for many years prior thereto, more or less oil-leasing activity in and around Wichita Falls, though only to a limited extent in the county where the land now belonging to the estate is located.

J. D. Avis at the time of making his will, and at the time of his death, and for a long time prior thereto, was a citizen of Wichita Falls. He was a shrewd business man, and accumulated quite an estate, and he selected the Bank as independent executor and trustee to handle his estate. It is undisputed that no oil and gas lease has been executed by the trustee on the land in question. The debts owed by the estate have been fully paid. The testator's wife is living and has never remarried. As we understand the record, it is not contended that the wife is not supplied with ample funds at all times. The sole question presented for determination is whether, under the terms of the will made by J. D. Avis, the First National Bank of Wichita Falls, as trustee, has the power to execute mineral leases on lands held by it as such trustee.

The primary rule governing the construction of wills is to ascertain the intention of the testator. This intention should be, if possible, gathered from the instrument itself. Furthermore, in order to ascertain the intention of the testator expressed in the will, the language used therein may be construed in connection with the surrounding facts and circumstances existing at the time the will was made. *Hassell et al.* v. *Frey et al.*, 131 Tex. 578, 117 S. W. (2d) 413; *Wallace et al.* v. *First Nat'l Bank of Paris,*

120 Tex. 92, 35 S. W. (2d) 1036; *Federal Land Bank of Houston* v. *Little* (Tex. Com. App.), 107 S. W. (2d) 374.

Now let us look at the will to ascertain the intention of the testator. The testator acknowledged that all property owned or possessed by him was community property of himself and wife, with certain exceptions described in paragraph No. 4 of the will. Since the following language used in the will forms the basis for the contention made that the trustee has the power to execute an oil and gas lease on the land held by it as trustee, we quote from the will the following:

"I hereby direct that all of said property together with any changes or accretions thereto, shall be held, used, managed, disposed of, sold, disbursed by said trustee, according to the further terms of this will; and I do hereby grant to said trustee full, ample, complete and absolute power to manage, control, sell, and dispose of said trust property, rent, make leases thereon, and in every way handle same, subject only to the express limitations hereinafter contained."

The express limitations contained in said will are as follows: (1) That all of his debts and funeral expenses be paid; (2) that the trustee shall keep the corpus of the estate intact, and that his wife shall be paid certain sums as provided for in paragraph 5; (3) that in the event his wife should remarry, his estate shall be divided as provided in paragraph 6; and (4) that in the event his wife should survive him and not remarry, then at her death provision is made for the division of the estate in paragraph 7.

Counsel for both petitioners and respondent concede that the language used in the will empowering the trustee

to rent such property and make leases thereon applies to ordinary leases, and not to mineral leases. This agreement is in accord with the decisions. *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108; *Lanyon Zinc Co.* v. *Freeman et al.,* 68 Kan. 691, 75 Pac. 995; 1 Ann. Cas. 403; Bogert on Trusts, Vol. 4, p. 2310, § 798, Ibid., p. 2415, § 828; see also *Smith et al.* v. *Womack et al.,* 231 S. W. 840 (writ dismissed). We therefore must look to the other language used in such will to see if it authorizes such trustee to execute an oil and gas lease.

When this will was made, certain fundamental rules relating to the power of a trustee to execute mineral leases prevailed. We will state some of them, and they are as follows: (1) It is generally accepted as a sound rule that a power to sell expressed in an instrument does not include the power to make an oil and gas lease. *Bean* v. *Bean,* 79 S. W. (2d) 652 (writ refused); 49 C. J., p. 1272, § 72; Perry on Trusts, Vol. 2, p. 282, § 774. (2) A testamentary trustee, holding land in fee in trust to pay the entire net proceeds to a beneficiary for life, with remainder to his heirs, holds it for the benefit of the remainderman as well as the life tenant, and, in the absence of language authorizing such trustee to make mineral leases, he is not authorized to grant the right to take the gas and oil from the property where no wells were open on the property at the time of the creation of the trust. *Ohio Oil Co.* v. *Daughetee, supra; Williamson* v. *Jones,* 43 W. Va. 562, 27 S. W. 410, 64 Am. St. 891, 38 L. R. A. 694; Thornton, Oil & Gas (4th ed.), Vol. 1, p. 762. See also *Lanyon Zinc* v. *Freeman et al., supra;* Bogert on Trusts, Vol. 4, pp. 2309-12, § 798. (3) The drilling of new oil wells on land in the interest of a life tenant is waste against the remainderman, which may be enjoined. Thorn-

ton, Oil & Gas (4th ed.), Vol. 1, p. 762; *Ohio Oil Co.* v. *Daughetee, supra; Williamson* v. *Jones, supra.*

The case of *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108, involved the construction of a will wherein the testator devised and bequeathed to a trustee in trust "all my estate, real, personal, and mixed, of whatever kind or nature soever, of which I may die seized or possessed, to have and to hold, manage, rent lease, and control, in trust, for the uses and purposes following:" It was contended in that case that the trustee had the right to execute an oil and gas lease under the terms of the will, and in the course of the opinion the Supreme Court of Illinois said:

"Granting that the trustee held the title in fee, he held it for the benefit of the remainderman as well as the life tenant, and had no right to waste the estate for the benefit of the life tenant, at the expense of the remainderman. It is a well-established rule of law that the opening of new mines upon land by a life tenant amounts to waste. *Priddy* v. *Griffity,* 150 Ill. 560, 41 Am. St. Rep. 397, 37 N. E. 999. The same rule applies to oil wells. Oil is a mineral and part of the realty. Owing to its fugitive nature, a grant of oil under the ground is a grant, not of the oil in place in the earth, but of such oil as the grantee may find there and save. The right to go upon the land and remove all the oil, if of unlimited duration, is a freehold estate (*Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Bruner* v. *Hicks,* 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888), and a grant of such right is therefore in legal effect a sale of a portion of the land (*Blakley* v. *Marshall,* 174 Pa. 425, 34 Atl. 564, 18 Mor. Min. Rep. 350; Stoughton's Appeal, 88 Pa. 198). There were no oil wells on the land at the time of the tes-

tatrix' death. A tenant for life under such circumstances would have had no right to operate for oil on the land. *Marshall* v. *Mellon,* 179 Pa. 371, 35 L. R. A. 816, 57 Am. St. Rep. 601, 36 Atl. 201, 18 Mor. Min. Rep. 548. Neither could the trustee operate for his benefit. The taking out of the oil would be waste, which a court of equity will enjoin. *Williamson* v. *Jones,* 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19."

The precise question presented here, so far as we can ascertain, has never been determined by this Court. The case of *Jackson* v. *Templin* (Tex. Com. App.), 66 S. W. (2d) 666, involved the power of a testamentary trustee to mortgage certain property belonging to the estate held by him as such trustee. The testamentary trustee was given "full power to rent or sell any of said trust property, as may seem best." The trustee was to provide for the "comfortable maintenance" of the daughter of the testator out of "income" from the property. It was held in that case that the trustee did not have the right to mortgage such property.

The case of *Bean* v. *Bean,* 79 S. W. (2d) 652 (writ refused), involved the language contained in a power of attorney to an attorney in fact, which gave him the right "to bargain, sell, grant and convey" certain lands. It was contended in that case that the attorney in fact had the power to make an oil and gas lease. The courts held to the contrary.

It is undisputed that the testator was a shrewd and successful business man, and that he lived in Wichita Falls and transacted business there, where the oil industry had been long established. It also appears that he was careful in the selection of the trustee to handle his estate, and was equally careful in placing in his will certain terms that had been construed by the courts in many cases. He

knew the history of the oil development in that part of the State and the importance of an oil and gas lease. It is significant that in the powers conferred on the trustee he did not authorize such trustee to execute oil and gas leases. The terms of his will are clear and unambiguous, and appear to have been carefully selected to express his wishes. If in the exercise of his meticulous care in preparing his will he did not desire to express the wish that the trustee should have the power to execute oil and gas leases, then certainly courts are not justified in writing into his will language that he did not see fit to use therein. The development of oil and gas has become an important industry in this State, and if a testator wants a trustee to execute an oil and gas lease on his property he can, with little trouble, say so in his will. It may have been sound business judgment for the testator to have authorized the trustee to execute an oil and gas lease if the trustee deemed it to the best interests of the estate to do so, but the property belonged to the testator, and he had the right to decide upon what terms same was to be handled by the trustee. The question was left solely to the testator to determine before he made his will, and the courts will be bound by his judgment. We have no right to substitute our judgment for his in order to control the construction of his will. *Adams* v. *Mauermann*, 90 Tex. 438, 39 S. W. 280. We therefore hold that the First National Bank of Wichita Falls, Texas, as Trustee, does not have the power to make a mineral lease on the land held in trust by it.

For the reasons above stated, the judgments of the Court of Civil Appeals and the District Court are both reversed, and judgment is here rendered construing this will as above indicated.